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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88182; File No. SR-NYSEArca-2020-11]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Equities Fees and Charges

February 12, 2020

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 3, 2020, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Fees and Charges (“Fee Schedule”). The Exchange proposes to implement the fee changes effective February 3, 2020. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule regarding the Exchange's tiered-rebate structure applicable to Lead Market Makers ("LMMs"),³ and to ETP⁴ Holders affiliated with such LMM, that provide displayed liquidity in Tape B securities to the NYSE Arca Book.

The proposed changes respond to the current competitive environment where order flow providers have a choice of where to direct liquidity-providing orders by offering further incentives for ETP Holders and LMMs to send additional displayed liquidity to the Exchange.

The Exchange proposes to implement the fee changes effective February 3, 2020.

Background

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining

³ The term "Lead Market Maker" is defined in Rule 1.1(w) to mean a registered Market Maker that is the exclusive Designated Market Maker in listings for which the Exchange is the primary market.

⁴ All references to ETP Holders in connection with this proposed fee change include Market Makers.

prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁵

As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”⁶ Indeed, equity trading is currently dispersed across 13 exchanges,⁷ 31 alternative trading systems,⁸ and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share (whether including or excluding auction volume).⁹ Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange currently has less than 10% market share of executed volume of equity.¹⁰

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow or discontinue or reduce use of certain categories of products. While it is not possible to know a firm’s reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any

⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005)

⁶ See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Final Rule).

⁷ See Cboe U.S Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

⁸ See FINRA ATS Transparency Data, *available at* <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is *available at* <https://www.sec.gov/foia/docs/atlist.htm>.

⁹ See Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

¹⁰ See *id.*

of the registered exchanges or non-exchange venues to which a firm routes order flow. With respect to non-marketable order flow that would provide displayed liquidity on an Exchange against which market makers can quote, ETP Holders and LMMs can choose from any one of the 13 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees and credits that relate to orders that would provide displayed liquidity on an exchange.

Proposed Rule Change

The proposed rule change is designed to be available to all ETP Holders and LMMs on the Exchange and is intended to provide ETP Holders and LMMs an opportunity to receive enhanced rebates by quoting and trading more on the Exchange.

The Exchange currently provides tier-based incremental credits for orders that provide displayed liquidity in Tape B securities to the NYSE Arca Book.¹¹ Specifically, LMMs that are registered as the LMM in Tape B securities that have a consolidated average daily volume (“CADV”) in the previous month of less than 100,000 shares, or 0.010% of Consolidated Tape B ADV, whichever is greater (“Less Active ETP Securities”), and the ETP Holders affiliated with such LMMs, currently receive an incremental credit for orders that provide displayed liquidity to the Book in any Tape B securities that trade on the Exchange.¹² The current incremental credits and volume thresholds are as follows:

- An additional credit of \$0.0004 per share if an LMM is registered as the LMM in at least

¹¹ See Securities Exchange Act Release Nos. 76084 (October 6, 2015), 80 FR 61529 (October 13, 2015) (SR-NYSEArca-2015-87); 79597 (December 19, 2016), 81 FR 94460 (December 23, 2016) (SR-NYSEArca-2016-165); and 85094 (February 11, 2019), 84 FR 4579 (February 15, 2019) (SR-NYSEArca-2019-05).

¹² The Exchange defines “affiliate” to “mean any ETP Holder under 75% common ownership or control of that ETP Holder.” See Fee Schedule, NYSE Arca Marketplace: General.

300 Less Active ETP Securities

- An additional credit of \$0.0003 per share if an LMM is registered as the LMM in at least 200 but less than 300 Less Active ETP Securities
- An additional credit of \$0.0002 per share if an LMM is registered as the LMM in at least 100 but less than 200 Less Active ETP Securities
- An additional credit of \$0.0001 per share if an LMM is registered as the LMM in at least 75 but less than 100 Less Active ETP Securities
- An additional credit of \$0.00005 per share if an LMM is registered as the LMM in at least 50 but less than 75 Less Active ETP Securities

The number of Less Active ETP Securities for the billing month is based on the number of Less Active ETP Securities in which an LMM is registered as the LMM on the average of the first and last business day of the previous month.

With this proposed rule change, the Exchange proposes to amend the requirement for a LMM to receive the \$0.0003 per share and the \$0.0004 per share incremental credits. As proposed, a LMM, and ETP Holders affiliated with such LMM, would receive an incremental credit of \$0.0003 per share if the LMM is registered as the LMM in at least 200 Less Active ETP Securities but less than 400 Less Active ETP Securities, instead of less than 300 Less Active ETP Securities, or alternatively, the LMM, and ETP Holders affiliated with such LMM, would receive an incremental credit of \$0.0003 per share if the LMM is registered as the LMM in at least 200 but less than 300 Less Active ETP Securities if the LMM, and ETP Holders affiliated with such LMM, adds liquidity in all securities of at least 1.00% of US CADV.

Additionally, a LMM, and ETP Holders affiliated with such LMM, would receive an incremental credit of \$0.0004 per share if the LMM is registered as the LMM in at least 400 Less

Active ETP Securities, instead of at least 300 Less Active ETP Securities, or alternatively, the LMM, and ETP Holders affiliated with such LMM, would receive an incremental credit of \$0.0004 per share if the LMM is registered as the LMM in at least 300 Less Active ETP Securities if the LMM, and ETP Holders affiliated with such LMM, add liquidity in all securities of at least 1.00% of US CADV.

The purpose of the proposed rule change is to encourage LMMs and ETP Holders to enhance the market quality in Tape B securities that are listed and traded on the Exchange by offering additional opportunities to earn incremental credits, which would support the quality of price discovery in Less Active ETP Securities on the Exchange and provide additional liquidity for incoming orders for the benefit of all market participants. The Exchange believes that providing alternative means of achieving the incremental credits to LMMs, and ETP Holders affiliated with such LMM, that add liquidity across all securities could lead to increased trading on the Exchange, and may lead to more LMMs to register to quote and trade in Less Active ETP Securities. The Exchange believes the proposal would also encourage competition in Tape B securities quoted and traded on the Exchange.

The Exchange does not know how much order flow LMMs and ETP Holders choose to route to other exchanges or to off-exchange venues. The incremental credits in NYSE Arca-listed securities are available to all LMMs that are registered as the LMM in a security, and to ETP Holders that are affiliated with a LMM. Currently, there are no LMMs that qualify for the \$0.0003 per share credit and 2 LMMs that qualify for the \$0.0004 per share credit.¹³ Without having a view of a LMM's activity on other markets and off-exchange venues, the Exchange has

¹³ As of January 31, 2020, there are 19 registered LMMs on the Exchange that could qualify for the incremental rebates for Less Active ETP Securities, all of whom are affiliated with one or more ETP holders.

no way of knowing whether this proposed rule change would result in more LMMs sending their orders in NYSE Arca-listed securities to the Exchange to qualify for the existing credits or whether this proposed rule change would result in LMMs to send more of their orders in NYSE Arca-listed securities to the Exchange to qualify for such credits. The Exchange cannot predict with certainty how many LMMs would avail themselves of this opportunity but additional liquidity-providing orders would benefit all market participants because it would provide greater execution opportunities on the Exchange.

The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹⁵ in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Fee Change is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4) and (5).

system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁶

As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”¹⁷ Indeed, equity trading is currently dispersed across 13 exchanges,¹⁸ 31 alternative trading systems,¹⁹ and numerous broker-dealer internalizers and wholesalers, all competing for order flow. As noted above, no exchange possesses significant pricing power in the execution of equity order flow.

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. With respect to non-marketable order which provide liquidity on an Exchange, LMMs and ETP Holders can choose from any one of the 13 currently operating registered exchanges to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

¹⁶ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁷ See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Final rule).

¹⁸ See Cboe Global Markets, U.S Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share/.

¹⁹ See FINRA ATS Transparency Data, *available at* <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is *available at* <https://www.sec.gov/foia/docs/atlist.htm>.

Given this competitive environment, the proposal represents a reasonable attempt to attract additional order flow to the Exchange.

The Exchange believes the proposed rule change to amend the requirement to qualify for the incremental credit of \$0.0003 per share and \$0.0004 per share, and adopting an alternative way to qualify for such incremental credits is reasonable because it is intended to continue to encourage LMMs, and ETP Holders affiliated with such LMM, to promote price discovery and market quality in all securities, not just Less Active ETP Securities, for the benefit of all market participants. The Exchange believes the proposed rule change is reasonable and appropriate in that the credits are based on the amount of business transacted on the Exchange. The Exchange believes that providing incremental credits to ETP Holders affiliated with a LMM that add liquidity in all securities, not just Less Active ETP Securities, is reasonable because the Exchange believes that by providing amended thresholds to qualify for the rebates, more LMMs may register to quote and trade in Less Active ETP Securities and generally transact more in all securities on the Exchange. The Exchange believes the proposed amendment to qualify for the current incremental credit for adding liquidity is also reasonable because it would encourage liquidity and competition in all securities quoted and traded on the Exchange. Moreover, the Exchange believes that the proposed fee change could incentivize LMMs to register as an LMM in Less Active ETP Securities and thus, add more liquidity in all securities, and in particular Tape B securities, to the benefit of all market participants.

Submission of additional liquidity to the Exchange would promote price discovery and transparency and enhance order execution opportunities for LMMs from the substantial amounts of liquidity present on the Exchange. All participants, including LMMs, would benefit from the

greater amounts of liquidity that will be present on the Exchange, which would provide greater execution opportunities.

On the backdrop of the competitive environment in which the Exchange currently operates, the proposed rule change is a reasonable attempt to increase liquidity on the Exchange and improve the Exchange's market share relative to its competitors.

The Proposed Fee Change is an Equitable Allocation of Fees and Credits

The Exchange believes the proposed rule change to amend the volume thresholds to qualify for the incremental LMM credits and providing an alternative way to qualify for such incremental credits is equitable because it provides discounts that are reasonably related to the value to the Exchange's market quality associated with higher volumes. The Exchange further believes that the incremental rebate is equitable because it is consistent with the market quality and competitive benefits associated with the fee program and because the magnitude of the additional rebate is not unreasonably high in comparison to the rebate paid with respect to other displayed liquidity-providing orders. The Exchange believes that it is equitable to offer increased rebates to LMMs as LMMs are subject to additional requirements and obligations (such as quoting requirements) that other market participants are not. The Exchange also believes that allowing ETP Holders to receive enhanced credits based on activities of their affiliates is equitable and not unfairly discriminatory because the Exchange believes that ETP Holders affiliated with LMMs may qualify to earn enhanced credits in recognition of their shared economic interest, which includes the heightened obligations imposed on LMMs. ETP Holders unaffiliated with LMMs do not share the same type of economic interests. Further, ETP Holders not affiliated with a LMM have an opportunity to establish such affiliation by several means,

including but not limited to, a business combination or the establishment of their own market making operation, which each unaffiliated firm has the potential to establish.

The Proposed Fee Change is not Unfairly Discriminatory

The Exchange believes that the proposed rule change is not unfairly discriminatory. In the prevailing competitive environment, LMMs and ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

The Exchange believes it is not unfairly discriminatory to amend the volume thresholds to qualify for the incremental rebates and to adopt an alternative method to qualify for such credits applicable to a LMM, and ETP Holders affiliated with such LMM, for orders that provide displayed liquidity in NYSE Arca-listed securities for which they are registered as the LMM, as the amended requirements would apply on an equal basis to all such participants. Further, the Exchange believes the proposed amendment to qualify for the incremental credit would incentivize LMMs to send more orders to the Exchange. The Exchange also believes that the proposed change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume.

The proposal to amend the volume thresholds to qualify for the incremental rebates neither targets nor will it have a disparate impact on any particular category of market participant. The proposal does not permit unfair discrimination because the proposed threshold would be applied to all similarly situated LMMs, who would all be eligible for the same credit on an equal basis. Accordingly, no LMM already operating on the Exchange would be disadvantaged by this allocation of fees.

Finally, the submission of orders to the Exchange is optional for LMMs and ETP Holders in that they could choose whether to submit orders to the Exchange and, if they do, the extent of

its activity in this regard. The Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,²⁰ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for LMMs and ETP Holders. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."²¹

Intramarket Competition. The proposed change is designed to attract additional order flow to the Exchange. The Exchange believes that the amended thresholds to qualify for the incremental credit applicable to LMMs, and ETP Holders affiliated with such LMM, would continue to incentivize market participants to direct their displayed order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages LMMs, to send orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The proposed thresholds to

²⁰ 15 U.S.C. 78f(b)(8).

²¹ See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

qualify for the incremental credit would be applicable to all similarly-situated market participants, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange's current market share of intraday trading (i.e., excluding auctions) is less than 10%. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)²² of the Act and subparagraph (f)(2) of Rule 19b-4²³ thereunder, because it establishes a due, fee, or

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(2).

other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²⁴ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2020-11 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2020-11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies

²⁴ 15 U.S.C. 78s(b)(2)(B).

of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2020-11, and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

J. Matthew DeLesDernier,
Assistant Secretary.

²⁵ 17 CFR 200.30-3(a)(12).

